

**UNITED STATES DISTRICT COURT**  
**DISTRICT OF NEVADA**

ELAINE L. CHAO, Secretary of Labor,  
United States Department of Labor,  
  
Plaintiff,  
  
v.  
  
PACIFIC STUCCO, INC., and JIM POPE,  
  
Defendants.

2:04-CV-0891-RCJ-GWF

## ORDER

This matter coming before the Court on Defendants’ Motion for Partial Summary Judgment (#49). The Court has considered the Motion, the pleadings on file, and oral argument on behalf of all parties. IT IS HEREBY ORDERED that Defendants’ Motion for Partial Summary Judgment (#49) is *granted in part* and *denied in part*.

## BACKGROUND

Defendants are engaged in the business of housing construction and repair and provide, among other services, lathing and plaster application for the exterior portion of homes. Defendant Jim Pope (“Pope”) has been President and General Manager of Defendant Pacific Stucco, Inc. (“Pacific Stucco”) for approximately ten years. Plaintiff Elaine Chao, the Secretary of Labor (“Plaintiff”), claims that Defendants violated the minimum wage and overtime provisions of the Fair Labor Standards Act (“FLSA”) by willfully underpaying their

1 employees and by failing to keep accurate records of employees' work hours. Prior to filing  
2 its Complaint (#1), Plaintiff interviewed 59 of the 262 current and former employees of  
3 Pacific Stucco regarding their hours worked and pay received. Over Plaintiff's objection, this  
4 Court ordered Plaintiff to identify the employee witnesses that Plaintiff intends to call at trial.  
5 Accordingly, Plaintiff gave Defendants a list of twelve employees, all of whom were lathing  
6 employees.

7 Pacific Stucco employs several lathing teams for its various construction projects.  
8 While only one lathing crew generally works at a particular construction site at a time, Pacific  
9 Stucco can have 20 to 30 lathing crews working at different sites at any given time. Each  
10 lathing crew is managed by a foreman or crew chief on site and every crew is supervised by  
11 one of five superintendents.

12 Pacific Stucco pays its field workers (including lathers and plasterers) using a  
13 piecework method. At the start of each week, each foreman turns in time sheets, which  
14 reflect the hours worked by their crew the previous week. When a house is finished, Pacific  
15 Stucco gives the foreman a timecard indicating the total amount of money that the crew will  
16 receive for its work on the house. The crew chief then divides the proceeds for that house  
17 among the employees on his crew. The majority of Pacific Stucco's policies related to hours  
18 worked and wages are contained in the company's Field Employee Handbook ("Handbook").  
19 Pacific Stucco claims that the employees are ultimately responsible for ensuring that their  
20 hours are accurately recorded according to company policy.  
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22 In 1999, the United States Department of Labor investigated Pacific Stucco for  
23 violations of federal wage and hour laws, but took no official action against Pacific Stucco.  
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1 As part of the National Recidivism Study, the United States Department of Labor initiated  
2 another investigation of Pacific Stucco in 2003. Although there were no facial inaccuracies  
3 in Pacific Stucco's time records, none of them showed overtime hours being worked. After  
4 interviewing employees, the Department of Labor discovered that several field employees did  
5 in fact work overtime hours during the relevant period. After the Department of Labor filed  
6 its Complaint (#1), Pacific Stucco claims to have conducted its own investigation. As part of  
7 that investigation, Pacific Stucco secured declarations from 16 field employees stating that  
8 they were properly paid for all hours worked and were not owed any overtime.  
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## 10 DISCUSSION

11 Defendants move the Court for partial summary judgment based on two principal  
12 theories. First, Defendants argue that the Court must limit the claims against Defendants  
13 based on Plaintiff's disclosed representative witnesses. Second, Defendants claim that the  
14 Court should dismiss the claims against Jim Pope because he does not qualify as an employer  
15 under the FLSA and did not have actual or constructive knowledge of any wage and hour  
16 violations.

### 17 I. Standard of Review

18 The purpose of summary judgment is to avoid unnecessary trials when there is no  
19 dispute as to the material facts before the court. *Northwest Motorcycle Ass'n v. U.S. Dep't of*  
20 *Agric.*, 18 F.3d 1468, 1471 (9th Cir. 1994). The moving party is entitled to summary  
21 judgment when the evidence on record establishes that there is no genuine issue of material  
22 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c);  
23 *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). Where reasonable minds could differ  
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1 on the material facts at issue, summary judgment is not appropriate. *Warren v. City of*  
2 *Carlsbad*, 58 F.3d 439, 441 (9th Cir. 1995).

3 The moving party bears the burden of informing the court of the basis for its motion,  
4 and presenting evidence demonstrating the absence of any genuine issue of material fact.  
5 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its  
6 burden, the party opposing the motion may not rest upon the mere allegations or denials of  
7 his pleadings but must set forth specific facts showing that there is a genuine issue for trial.  
8 *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

## 9 **II. Limitation of Claims Based on Representative Witnesses**

10 First, Defendants argue that they are entitled to partial summary judgment because  
11 Plaintiff's claims are limited based on the disclosed representative witnesses. Defendants  
12 assert that the representative witnesses only support claims against lathers that worked on the  
13 same crews as the representative witnesses. Defendants also argue that the Court should  
14 dismiss all claims concerning the 16 employees who provided declarations in which they  
15 stated that they were properly paid and Pacific Stucco did not owe them any overtime salary.

### 16 **A. Limitation of Claims to Lathers Only**

17 Defendants argue that Plaintiff cannot support claims against Pacific Stucco on behalf  
18 of field employees other than lathers. Pursuant to this Court's Order (#44), Plaintiff  
19 disclosed a list of employees that the Secretary of Labor intends to call as trial witnesses.  
20 Defendants note that all of the employees on the list worked for Pacific Stucco as lathers.  
21 Originally, Plaintiff expressed intentions of filing suit on behalf of lathers and plasterers.  
22 However, Plaintiff informed the Magistrate Judge that Plaintiff was no longer pursuing  
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1 claims on behalf of plastering workers. (*See* Mag. Order (#29) at 2.) Principles of judicial  
2 estoppel thus prevent Plaintiff from now pursuing claims on behalf of plasterers. *See New*  
3 *Hampshire v. Maine*, 532 U.S. 742, 749–51 (2001). At oral argument before this Court,  
4 Plaintiff conceded this point. Therefore, the Court grants Defendants’ Motion (#49) in so far  
5 as it requests the Court to dismiss all actions on behalf of field employees other than lathers.

6 **B. Limitation of Claims to Employees Who Worked on Same Crews as**  
7 **Representative Witnesses**

8 Defendants also argue that Plaintiff’s claims must be limited to lathers who worked  
9 on the same crews as the representative employees listed by Plaintiff. The Secretary of Labor  
10 may provide representative testimony to establish class-wide back wage relief. *See, e.g.,*  
11 *Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687–88 (1946). A determination of  
12 whether the representative testimony adequately represents the class depends on the nature of  
13 the work involved, the working conditions and relationships, and the detail and credibility of  
14 the testimony. *See McLaughlin v. Ho Fat Seto*, 850 F.2d 586, 589 (9th Cir. 1988). Plaintiff’s  
15 representative witnesses testified that they worked uncompensated overtime hours as lathing  
16 employees for Pacific Stucco. Defendants claim that Plaintiff’s representative witnesses only  
17 properly support claims on behalf of other lathers who worked on the same crews. They  
18 claim that representative testimony must be provided from each crew.

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20 This Court must consider the nature of the work involved as well as the relevant  
21 working conditions and relationships to determine whether Plaintiff’s representative  
22 witnesses adequately represent a class of all lathe workers at Pacific Stucco. *Id.* Every  
23 Pacific Stucco lathing crew does the exact same work. Their working conditions do not vary,  
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1 and they perform the same job duties on the various construction sites. Testimony from at  
2 least five former lathing employees representing several crews reflects that they, along with  
3 the rest of their crews, worked overtime hours without additional compensation. Those  
4 witnesses testified that their various crews started and ended work at the same time. A  
5 former crew chief testified that he had knowledge of other lathing crews at other work sites  
6 putting in the same uncompensated overtime hours as his crew. A superintendent testified  
7 that on the occasions that he visited a work site after hours, he found employees working  
8 overtime hours 40 percent of the time. Furthermore, every crew filled out the same time  
9 sheets and received payment using the same piecework method. Plaintiff claims that  
10 Defendant Jim Pope instituted a company policy of prohibiting employee time sheets from  
11 reflecting more than 40 hours worked per week, regardless of the actual time spent working.<sup>1</sup>  
12 This alleged FLSA violation applied to all of Pacific Stucco's lathing crews.  
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14 Defendants rely on unpersuasive authority to support their claim that Plaintiff's  
15 witnesses do not adequately represent the class of lathing employees at Pacific Stucco.  
16 Defendants principally rely on *Reich v. Gateway Press, Inc.*, 13 F.3d 685 (3d Cir. 1993), in  
17 which the appellate court remanded the case to the trial court for more information on  
18 newspaper reporter representative testimony because it was not clear whether the testifying  
19 witnesses were newspaper reporters, where they worked, or the number of hours they worked.  
20 In this case, all of Plaintiff's representative witnesses are lathers, and their crew assignments  
21 and stated hours of work are clear based on their testimony and Pacific Stucco's records.  
22 Defendants also rely on *Grochowski v. Phoenix Construction*, 318 F.3d 80 (2d Cir. 2003), in  
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24 <sup>1</sup> For Plaintiff's support of this assertion, see Section III.B.

1 which representative witnesses were inadequate since there was insufficient evidence  
2 showing lack of overtime compensation because the court did not know how much the  
3 employer actually paid the employees, and *Secretary of Labor v. DeSisto*, 929 F.2d 789 (1st  
4 Cir. 1991), in which Plaintiff attempted to have one witness testify as the representative of  
5 244 employees. Here, Pacific Stucco's records clearly show how much it paid to each lathing  
6 employee, and Plaintiff is not attempting to use a single employee as a class representative.

7 Based on the foregoing, Plaintiff has presented sufficient evidence at this stage of the  
8 litigation to demonstrate that its representative witnesses adequately represent all lathing  
9 employees at Pacific Stucco. At the summary judgment stage, Plaintiff has successfully  
10 refuted Defendants' assertion that at least one representative witness must come from each  
11 lathing crew. While the trier of fact might ultimately determine that Plaintiff's representative  
12 witnesses are not credible, such a determination is inappropriate at the summary judgment  
13 stage of proceedings. *See, e.g., Bator v. Hawaii*, 39 F.3d 1021, 1026 (9th Cir. 1994).

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15 **C. Dismissal of Claims Concerning 16 Employees Who**  
16 **Provided Declarations**

17 Defendants also argue that the Court should dismiss all claims on behalf of 16 Pacific  
18 Stucco employees who provided Defendants with declarations in which they allegedly stated  
19 that they were properly paid and Pacific Stucco did not owe them any overtime salary.  
20 However, Plaintiff presents evidence that demonstrates a genuine issue of material fact as to  
21 the validity of the assertions that Defendants urge the Court to adopt in the employee  
22 declarations. Several facts on record call into question the validity of the declarations.  
23 Defendants claim that each employee was admonished that Pacific Stucco would not retaliate  
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1 against them based on their statements regarding overtime hours and wages. However, two  
2 of Plaintiff's employee-witnesses testified that their supervisors threatened to fire them if  
3 they complained regarding Pacific Stucco's timekeeping and payroll practices. At least one  
4 other employee felt that he would likely lose his job if he complained. Another witness  
5 testified that he was told that he would be fired if he approached the Pacific Stucco office to  
6 discuss his hours. Witnesses also testified that Pacific Stucco's policy was to distribute  
7 documents regarding payment to the employees with their paychecks, and some Spanish-  
8 speaking employees testified that they had to sign documents in English in order to receive  
9 their paychecks on occasion. Furthermore, the timing of the declarations is suspect.

10 Although the Department of Labor investigated Pacific Stucco in 1999, and again in 2003,  
11 Pacific Stucco did not secure these declarations until it discovered the Secretary of Labor's  
12 intent to file a Complaint (#1) in this action. These circumstances create a genuine issue of  
13 material fact as to whether the 16 declarations are trustworthy. The trier of fact should have  
14 the opportunity to determine whether the employees who provided the declarations did so  
15 under pressure or duress, or whether they were truthful and thus do not qualify for back  
16 wages as part of the class.

### 17 **III. Claims against Jim Pope**

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19 Defendants move the Court to dismiss all claims against Jim Pope because he does  
20 not qualify as an employer under the FLSA, and he had neither actual nor constructive  
21 knowledge of the violations alleged in Plaintiff's complaint.  
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1           **A.       Pope Qualifies as an Employer under the FLSA**

2           Both the Supreme Court of the United States and the Ninth Circuit Court of Appeals  
3 have applied an expansive definition of “employer” under the FLSA. *See Falk v. Brennan*,  
4 414 U.S. 190, 195 (1973); *Lambert v. Ackerley*, 180 F.3d 997, 1011 (9th Cir. 1998). Whether  
5 an actor qualifies as an employer under the FLSA “does not depend on isolated factors but  
6 rather upon the circumstances of the whole activity.” *Gilbreath v. Cutter Biological, Inc.*,  
7 931 F.2d 1320, 1324 (9th Cir. 1991). Relevant factors include the authority to hire and fire  
8 employees, supervision and control of the conditions of employment, determination of rate  
9 and method of pay, and maintenance of employment records. *Bonnette v. California Health*  
10 *& Welfare Agency*, 704 F.2d 1465, 1470 (9th Cir. 1991). Individuals who exercise economic  
11 and operational control over the employment relationship have also been considered  
12 employers under the FLSA. *See Lambert*, 180 F.3d at 1011.

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14           Based on these factors, Jim Pope qualifies as an employer under the FLSA. As  
15 President and General Manager of Pacific Stucco, Pope has broad operational control over  
16 the company, including the company’s piecework payment plan and overtime policy. He has  
17 run the company for approximately the last 10 years, and he spends six to seven hours a day  
18 in the Pacific Stucco office. Pope is also involved in the personnel practices and policies of  
19 Pacific Stucco. It is undisputed that he helped prepare the field worker Handbook and has the  
20 power to hire and fire employees. Pope served as Pacific Stucco’s representative during both  
21 Department of Labor investigations. Nevertheless, Defendants assert that Pope does not  
22 qualify as an employer under the FLSA.  
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1 Defendants argue that Pope does not qualify as an employer under the FLSA because  
2 he is not directly responsible for the day-to-day operations on the construction sites.  
3 Specifically, Pope did not personally hire and does not directly supervise the employees  
4 whose wages are at issue in this case. These factors do not absolve Pope of individual  
5 liability under the FLSA. As noted above, the totality of the circumstances concerning  
6 Pope's involvement with Pacific Stucco determine liability under the FLSA, not isolated  
7 factors. *See Gilbreath*, 931 F.2d at 1324. Requiring Pope to have direct day-to-day control  
8 over the employees contradicts the accepted expansive definition of "employer" under the  
9 FLSA. It is well established that a corporate officer without direct daily supervisory  
10 responsibilities over employees can still qualify as an employer under the FLSA. *See, e.g.,*  
11 *Herman v. RSR Security Services, Ltd.*, 172 F.3d 132, 139 (2d Cir. 1999). As President and  
12 General Manager, Pope had operational control over the piecework payment system and he  
13 was the ultimate authority on personnel decisions. Pope had authority to abandon the  
14 piecework system after the Department of Labor informed him that the system resulted in  
15 underpayment to field workers. Instead, Pope specifically decided to retain the piecework  
16 system. Accordingly, although Pope did not personally hand out paychecks to the lathe  
17 workers, he was responsible for Pacific Stucco's payment policies, which are directly at issue  
18 in this case.  
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20 Pope's general operational control over Pacific Stucco, his daily presence in the  
21 office, his development of personnel policies such the piecework payment system and hour  
22 requirements, his ability to hire and fire, and his personal representation of Pacific Stucco  
23 throughout the Department of Labor investigations demonstrate at least a triable issue of fact  
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1 as to Pope's personal liability as an employer under the FLSA.

2 **B. Pope's Knowledge of Alleged Violations**

3 Defendants argue that even if Pope qualifies as an employer under the FLSA, he  
4 cannot be found liable in this case because he did not have actual or constructive knowledge  
5 of the alleged violations. Defendants note that an employer under the FLSA is only liable if  
6 he had actual or constructive knowledge of the alleged violations. *See, e.g., Forrester v.*  
7 *Roth's IGA Foodliner*, 646 F.2d 413, 414 (9th Cir. 1981). Defendants claim that none of  
8 Pacific Stucco's lathe workers ever notified Pope that they were underpaid for their work.  
9 Furthermore, Defendants argue that Pope did not have constructive knowledge of overtime  
10 hours worked or wage violations because Pacific Stucco's policy was that the employees had  
11 the ultimate responsibility of ensuring that their time sheets accurately reflected their hours  
12 worked. Defendants contend that Pope trusted the time sheets because of this company  
13 policy, and any errors occurred because the employees willingly signed inaccurate time  
14 sheets. Pope had no reason to suspect that the time sheets were inaccurate. Accordingly,  
15 Defendants move the Court for summary judgment because Pope had neither actual nor  
16 constructive knowledge of the alleged FLSA violations in this case.

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18 Plaintiff notes that Defendants have misstated the knowledge requirements under the  
19 FLSA. While actual or constructive knowledge is required, Defendants fail to point out that  
20 an employer has constructive knowledge if he fails to make efforts to enforce company  
21 policies in such a way as to prevent FLSA violations. Merely promulgating company policies  
22 without further enforcement is insufficient:  
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1 In all such cases, it is the duty of the management to exercise its control and  
2 see that the work is not performed if it does not want it to be performed. It  
3 cannot sit back and accept the benefits without compensating for them. The  
4 mere promulgation of a rule against such work is not enough. Management  
5 has the power to enforce the rule, and must make every effort to do so.

6 29 C.F.R. § 785.13. Because genuine issues of material fact exist as to whether Pope had  
7 knowledge of the FLSA violations in this case, summary judgment is inappropriate.

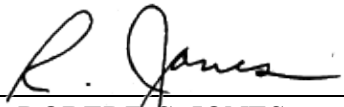
8 Following the 1999 investigation, the Department of Labor advised Pope that his  
9 payment system failed to compensate field workers for \$80,000 in overtime wages.  
10 Nevertheless, there is no evidence that Pope thereafter visited construction sites to ensure that  
11 the field workers did not continue to work overtime. However, the record shows that when  
12 one superintendent occasionally visited the construction sites after hours, he found that field  
13 employees were working overtime hours 40 percent of the time. Nevertheless, Pope  
14 continued to accept the 40-hour time sheets as accurate. Plaintiff argues that Pope instituted  
15 a policy that the time sheets could never reflect more than 40 hours worked per week, and he  
16 purposely did not inquire as to whether field employees were in fact working longer hours.  
17 The record demonstrates that Pope disciplined a crew chief because he listed more than 40  
18 hours per week on a time sheet. Evidence on record demonstrates that crew chiefs routinely  
19 filled out the time sheets on behalf of the field workers, and one crew chief testified that an  
20 office worker told him the exact starting and ending times to put on the time sheets.  
21 Furthermore, several employees testified that they were working approximately 60-hour  
22 weeks for six years. Deposition testimony revealed that supervisors admitted that they did  
23 not keep accurate hours on their employees' behalf, and foremen were not permitted to turn  
24 in time sheets reflecting more than 40 hours worked per week.

1 The foregoing evidence on record raises a genuine issue of material fact as to whether  
2 Pope knew, or should have known through reasonable efforts, that field employees were  
3 working unpaid overtime hours. Therefore, summary judgment is inappropriate regarding  
4 Pope's liability.

5 **CONCLUSION**

6 Therefore, IT IS HEREBY ORDERED that Defendants' Motion for Partial Summary  
7 Judgment (#49) is *granted in part* and *denied in part*. Defendants' Motion (#49) is granted in  
8 so far as it requests the Court to dismiss all claims on behalf of field employees other than  
9 lathers. Defendants' Motion (#49) is denied on all other grounds.  
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14 DATED: August 11, 2006.  
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20 ROBERT C. JONES  
21 UNITED STATES DISTRICT JUDGE  
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